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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

YALE LUBMAN, THOMAS J. MURPHY,
JOHN S. SEISS AND JOSEPH STEWART,

Petitioners

—v.—

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S SUPPLEMENTAL BRIEF
IN OPPOSITION

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Respondent Mayor and City Council of Baltimore, pursuant to Rule 15.7 of the Supreme Court Rules (January 1, 1990), submits the following Supplemental Brief in Opposition to Petition for Writ of Certiorari in order to address new matters raised in the Brief *Amicus Curiae* filed by Robert F. Carlson.

ARGUMENT

In his Brief *Amicus Curiae*, Robert F. Carlson ("Carlson") makes a number of unsupported assertions about the performance of California's Public Employees' Retirement System ("PERS"). These assertions are stated as fact, but Carlson offers no basis for them in any part of the record in this case, or, indeed, in any appendix or exhibit. See Brief *Amicus Curiae* at 2-3 (hereafter "Amicus Brief"). For instance, Carlson claims that the Public Employees' Retirement System administers 56 billion dollars in investments, Amicus Brief at 2, all of which is subject to the California divestment statute, Government Code §§ 16640-16649. In addition, Carlson claims the PERS and the Legislators' Retirement Systems' total returns have diminished 1.21% annually due to divestment, and have incurred significant other charges associated with divestment and purchase of alternative investments. *Id.* at 3.

Carlson's representations, however, ought not to be considered by this Court. There is not a scintilla of evidence in the record to support such claims as the total value of funds administered by PERS, the pension fund of another state, and claims of lost performance and costs incurred in divestment and repurchase. Similarly, there is no discussion in the Amicus Brief of important issues such as PERS' management style, investment targets, track record, etc. Compare P. App. at E-22-26. As important, neither the parties nor this Court have any way of knowing whether the scant representations that have been made have any basis in fact.

Indeed, judicial facts not a part of the record may not be considered by this Court. See *Adickes v. Kress*, 398 U.S. 144, 157-58 n.16 (1970) (unsworn statement of witness, not contained in record, could not be properly considered by Court); *Hopt v. Utah*, 114 U.S. 488, 491-92

(1885); *Russell v. Southard*, 12 How. 139, 158-59 (1851) ("This Court must affirm or reverse on the case as it appears in the record."). By contrast, the performance of the Baltimore City pension funds under the Baltimore City Ordinances ("the Ordinances") was carefully litigated and subject to intense scrutiny on the part of the trial court below and the Court of Appeals of Maryland. *See, e.g.*, P. App. at D-2-13 and E-21-26. The evidence presented involved "massive financial investment data, including charts, graphs, and intricate mathematical computations." *Id.* at E-21. Carlson's assertions about costs and losses associated with the divestment statute have not been subjected in this case to any of the tests of the adversary system and cannot be credited. Even if it were the case that certain losses or diminished returns have been sustained by the California PERS in recent years, it is not clear, without any fact and expert testimony under oath, that such losses stem in whole or in part from divestment.

In the remainder of his Brief, Carlson presents no new law or argument as to the merits of the Petition for Certiorari filed by the Beneficiaries of the pension funds.¹ Respondent reiterates that the Petition and Amicus Brief do not raise or implicate any substantial issue of federal constitutional or statutory law, and the Petition for Certiorari should be denied. If it is really true

¹Carlson makes the surprising assertion, however, that the Comprehensive Anti-Apartheid Act ("CAAA") "does not contain an express preemption provision." Amicus Brief at 5. That assertion is directly contradicted by the language of the statute itself. Congress chose to preempt certain local and state actions, but expressly limited that preemption to state and local limitations on procurement. *See* 22 U.S.C. § 5116 (1989 Supp.) It is this very section, coupled with House Resolution 549 (1986) passed at the same time as the CAAA, in which the House affirmatively declared its intent that the CAAA not preempt local or state authority to pass ordinances such as the Baltimore City Ordinances, that places beyond dispute the assertion that the Ordinances are neither expressly nor impliedly preempted.

that "guidance is urgently needed", Amicus Brief at 10, by Carlson and other members of boards of pension funds around the country, the guidance may be provided by summary affirmance.

Respectfully submitted,
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